No. 14,919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S CLOSING BRIEF

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ARGUMENT*

The newly discovered evidence corroborates the otherwise unsupported testimony of appellant on the issue that he made payments to Gersh to obtain whiskey in the black market.

Its significance is plain. In Justice Douglas' words, "it goes to the heart of the case." The jury recommended leniency even when appellant's testimony was uncorroborated. There is every reason to expect that the newly discovered evidence would at least raise a reasonable doubt of guilt.

The Government argues that appellant has not made a showing of the existence of any legally admissible testi-

* Appellant takes issue with various points made in the Government's restatement of the facts at pages 2-4 of the Government brief. For convenience, the points appellant disputes are discussed at the appropriate places in the argument below.

mony corroborating appellant — that Corriston's testimony is legally inadmissible, and that United States Attorney Burke denies that the evidence in his possession is legally admissible.

If these contentions are sound, the District Judge was correct in ruling (R. 26) that the motion, with supporting affidavits, "fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence."

Appellant submits that the District Judge erred and that these contentions are not sound, that Mr. Corriston's testimony is legally admissible, and that it is for the court and not for the United States Attorney to determine whether or not the evidence in his possession is legally admissible.

Those are the issues in this case. The Government's brief claims there are various other grounds on which appellant's motion might be denied even if the Corriston evidence is admissible, and erroneously contends that this case merely raises issues of discretion for the trial court. These alleged grounds for denial of the motion are without merit. They stand contrary to the plain facts of record and are opposed to the first opinion of this Court in *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir. 1952). They were not accepted by the District Judge, and they could not be accepted in a sound exercise of discretion.

In effect the Government is contending that appellant's admitted large cash overceiling receipts on sales of case whiskey establish guilt of tax evasion conclusively and that there is no real substance to appellant's defense that these receipts did not exceed the amounts he paid as cash bonuses for acquiring the case whiskey in the black market.

Appellant's defense is a substantial one. Indeed this Court so held in *Wolcher* v. *United States,* 200 F. 2d 493, supra, on the first appeal, where Gersh, as rebuttal witness for the Government, admitted receipt of a substantial

part of the sums testified to by appellant but contended they were to buy coin machines which required advance payments in cash. The Government contended that any errors of the trial court were not prejudicial in view of appellant's own testimony of large cash receipts not reflected in his ordinary books. This Court's opinion reflects the large gap between proof of black market violations and proof of income tax evasion. In reversing the conviction it found that there was substantial and prejudicial error in excluding evidence to impeach Gersh's "coin machine" explanation.

On the second trial the jury convicted but recommended leniency. Unwilling to expose Gersh to the wider defense rebuttal envisaged by this Court's opinion the prosecution released Gersh from subpena on the second trial. On the Government's objection of lack of materiality,[1] the District Judge stopped the defense from questioning the cognizant internal revenue agent in charge concerning the bank records which at the first trial had corroborated Gersh's receipt of substantial cash sums from appellant. On the Government's objection the District Judge denied the application of defense counsel to reopen in order to call Gersh whom he had just learned was in fact in San Francisco. The Government's actions and the Court rulings are not argued here to be reversible error. But they are an important part of the background of this appeal in terms of the nature of the record underlying the second conviction.

Thus it is seen that the jury recommended leniency even on a record utterly barren of testimony corroborating appellant's evidence of black market payments to Gersh.

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[1] The Government later conceded that these records were material but argued that they should have been identified through Gersh and not a revenue agent who obtained them in the course of his investigation. (Opposition to Petition for Certiorari, No. 77, Supreme Court, October Term 1955, p. 17.)

Had Mr. Schnacke made that concession to Judge Goodman it cannot be doubted that the subsequent defense application to call Gersh would have been granted.

The prosecuting attorney argued tellingly that there was nothing other than appellant's unsupported testimony to establish any cash payments by appellant to Gersh, and nothing to connect Gersh, publisher of a coin magazine, with purchases in the whiskey black market. (R. 7-8.)

At the first trial the corroboration of appellant's cash payments to Gersh was established, but on the crucial issue of purpose of the payments, evidence tendered by appellant was rejected. At second trial appellant's testimony, both as to the payments to Gersh and as to the purpose thereof, was wholly uncorroborated.

The newly-discovered evidence will make available to a jury for the first time direct testimony corroborating appellant on the crucial issue that his substantial payments to Gersh were for the purpose of obtaining whiskey in the black market.

Having twice obtained convictions on truncated records, the Government fully appreciates the significance of a new trial and the impact of this newly-discovered evidence upon the jury. There is every reason to expect that a jury given all the evidence now available would acquit appellant. And we submit that the newly discovered evidence should not be rejected as legally inadmissible.

I. MR. CORRISTON'S TESTIMONY IS LEGALLY ADMISSIBLE

A. The testimony is clearly within the general principles of the res gestae rule and is barred by none of the recognized limitations on the res gestae rule.

Without detailing again the authorities in appellant's opening brief (pp. 18-21) the essentials of the res gestae doctrine provide for admissibility of extrajudicial declarations which either (1) are themselves acts in issue (whether as ultimate facts or evidentiary facts); or (2) are contemporaneous therewith, or are necessary incidents as immediate preparations for or emanations of such acts

and this stand in causal relation to the acts, and illustrate the character of the act or transaction.

Statements are res gestae if they are said under the immediate spur of the transaction, and are not mere narrative statements that may reflect a "voluntary individual wariness seeking to manufacture evidence for itself"—an interposition breaking the necessary causal relation.

What is the application of these principles to the case at bar?

Gersh's declarations were all "verbal acts"—solicitations of supply, negotiations to assure supply and ability to pay, and verbal agreements—that were actually part of his black market activities.

Mr. Gersh's declarations concerning the fact that he was acquiring the whiskey for appellant and was using money he had received from appellant both (a) served to illustrate the character of his black market activities, as made for the benefit of appellant, and (b) were stated as part of the preparations for the black market purchases and under the spur of consummating those purchases. For these declarations were made as part of an explanation to obtain Mr. Corriston's help, and more important were made to convince Corriston that he, Gersh, would be in a position to consumate the deal and thus to induce Corriston to arrange the meeting between Gersh and Taylor. These declarations were not mere narrations of past events but were rather an integral and causal part of a current black market purchasing program. They were thus admissible as part of the res gestae.

That these black market activities were relevant evidentiary facts to appellant's defense cannot be doubted. Indeed, Mr. Schnacke tellingly argued to the jury that Gersh was not shown by defendant to have engaged in any black market whiskey transactions. (R. 7-8.)

Whether the declaration is inadmissible as self-serving depends on the situation when the declaration was made. Thus in *Chicago M. & St. P. Ry. Co.* v. *Chamberlain,* 253

Fed. 429 (9th Cir. 1918), a witness testified that when he saw the plaintiff on the platform, and bid him goodby, plaintiff said he was going on through with the witness on the train. Judge Morrow said (p. 430):

> "It was not self-serving; unless it can be presumed that the plaintiff anticipated falling from the platform; and that he knew it was necessary that he should have the rights of an intending passenger to enable him to recover for whatever injuries he received . . .
>
> "In a sense, the testimony of the witness was hearsay, but it stood 'in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself. Wharton on Evidence, (3d Ed., 1888), par. 259. In this sense it was a part of the res gestae."

See also e.g., *Roberson* v. *State,* 18 Ala. App. 143, 90 So. 70 (1921), where the Court held admissible as part of the res gestae a defendant's declarations at the time of the alleged offense which showed commission of a crime other than that for which he is charged.

The *Chamberlain* case also establishes that the declaration need not be made under stress of excitement to be admissible so long as it was a natural accompaniment of the transaction rather than a calculated wariness seeking to manufacture evidence. Accord: *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927), involving declarations immediately following a business transaction.

The Government's objection to a testimonial use of Gersh's res gestae declarations is without merit as a basis for excluding Corriston's testimony. First, there is no testimonial use required in the showing that Gersh was engaged in buying whiskey in the black market. As already noted, Mr. Schnacke pointed out to the jury that there was no evidence connecting Gersh to the whiskey black market (R. 8). Such evidence is provided by Gersh's statements of current and proposed activities, and of his intention in

paying money; these statements are in no way narrative or used testimonially.

Second, although res gestae declarations are not admissible merely because of their testimonial use, if they are admissible as the incidents of an act or transaction in issue—here the black market activity—they may be used testimonially insofar as they describe the nature or character of the incidents—black market purchases for the benefit of Wolcher. This is plain from the *Chamberlain* and *Aetna* cases cited above, and from *Insurance Co.* v. *Mosley*, 8 Wall. 397 (1869), and the other cases cited in appellant's opening brief.

Indeed, the Federal courts have often noted that the contemporaneous declaration that is part of the res gestae is more likely to be reliable than the subsequently deliberated testimony. It was early noted that the res gestae exception to the hearsay rule should not be narrowly or technically applied. *Insurance Co.* v. *Mosley*, 8 Wall. 397, 408 (1896). And that is also the modern tendency of the cases, see *Weatherbee* v. *Safety Casualty Co.*, 219 F. 2d 274, 278 (5th Cir. 1955).

B. In any event, Gersh's statements to Corriston are admissible as declarations of a co-conspirator

1. Appellant insists, as was urged in the opening brief, that as a matter of principle the declarations of Gersh, having been made by appellant's partner in crime during the pendency of their conspiracy, should be admissible at the behest of appellant to prove the OPA violation since they would have been admissible at the Government's instance in an OPA violation case.

2. Whether or not all Gersh's declarations during the pendency of the conspiracy are admissible his statements to Corriston are admissible because they are part of the res gestae of the black market conspiracy.

a. The declaration of a co-conspirator can be availed of by an accused if it is part of the res gestae of the conspiracy.

This has been a recognized part of the common law since Justice Best decided *Rex* v. *Whitehead,* 171 Eng. Rep. 1105 (1824), and overruled the objection that letters between co-conspirators could be evidence against them but not in their favor. The rule is noted in 22 Corpus Juris Secundum, Criminal Law, sec. 777, and 16 Corpus Juris, Criminal Law, pp. 668-9, citing *Rex* v. *Whitehead, supra; Meador* v. *State,* 72 Tex. Cr. 527, 162 S. W. 1155 (1914), and *Zellerbach* v. *Allenberg,* 99 Cal. 57, 33 Pac. 786 (1893). In the *Zellerbach* case, the court said that "any communications from one alleged conspirator to the other, made while the conspiracy was in progress, and relating to its subject matter, were part of the res gestae, and admissible."

In this connection it should be noted that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, even though offered in favor of the principal. 32 C. J. S., Evidence, sec. 410; *Aetna Ins. Co.* v. *Licking Valley Milling Co.,* 19 F. 2d 177 (6th Cir. 1927); *American Ins. Co.* v. *Lowry,* 62 F. 2d 209 (5th Cir. 1932). Men who enter into concert for an unlawful end "become *ad hoc* agents for one another and have made a partnership in crime." *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2d Cir. 1945); see *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1955).

b. Since a conspirator's declaration that is part of the res gestae of a conspiracy is admissible in favor of a co-conspirator, the only question is whether Gersh's statements to Corriston are part of the res gestae of the black market conspiracy.

It has been specifically and repeatedly held that where the facts show a conspiracy or common plan, the scope of the res gestae is viewed broadly by the courts and includes all declarations in furtherance of the common object, all declarations that are part of the res gestae of acts done in furtherance of the common object, and indeed all declarations relating to the common object.

A leading case is this Court's opinion in *Jones* v. *United States,* 179 Fed. 584 (9th Cir. 1910). Judge Morrow's opinion undertakes an extensive review and analysis of numerous Supreme Court decisions admitting declarations of a co-conspirator in evidence, points out that these opinions hold the declarations admissible on the ground that they are part of the res gestae of the conspiracy, and further points out that the res gestae of a conspiracy include declarations in furtherance of the common object, declarations that are part of the res gestae of acts done in furtherance of the common object, and declarations relating to the common object.

The *Jones* case charged a conspiracy to defraud the United States out of timber lands. There was admitted in evidence a statement by forest superintendent Ormsby to his son, made prior to the date that he went to look over the land, that there was going to be a reserve established in eastern Oregon.

It was objected that the declarations of a co-conspirator cannot be admitted unless made in aid or execution of the conspiracy. The court held that this rule limited admissibility to declarations made during the pendency of the conspiracy, but did not require the declaration itself to be in furtherance of the conspiracy. This court ruled (p. 60) that "the statement was made while the conspiracy was in progress, related to the object of the conspiracy, and was therefore part of the res gestae."

In *Vilson* v. *United States,* 61 F. 2d 901 (9th Cir. 1932) this Court held the rule applicable even though there was no conspiracy charge, stating (p. 902): "The common object of the associated persons forms a part of the res gestae, and evidence was admissible, even though conspiracy was not charged."

3. The cases holding certain extrajudicial declarations of a co-conspirator inadmissible in favor of the accused rest on particular rules that are consistent with the doctrine stated above (point 2) and have no bearing in excluding Corriston's testimony.

a. First there are cases like *Nothaf* v. *State,* 91 Tex. Cr. 378, 239 S. W. 215, cited in the Government's brief (p. 16), where exculpatory declarations were made by an accomplice in jail. These merely exemplify the requirement that the conspiracy be in progress. The arrest of a conspirator terminates as to him both the conspiracy and the res gestae, so that his subsequent declarations cannot be used either for or against the others. *People* v. *Beller,* 294 Mich. 464, 293 N. W. 720 (1940); see *United States* v. *Pugliese,* 153 F. 2d 947 (2d Cir. 1945).

b. Second, extrajudicial declarations of a third party confessing *exclusive* guilt are inadmissible. *Donnelly* v. *United States,* 228 U. S. 243 (1913). These declarations by their very nature are not made as a part of or during pendency of a conspiracy.

c. An extrajudicial declaration of a person involved in a crime which is self-serving when made is not in furtherance of the conspiracy, and under standard doctrine can not be considered part of the res gestae since a self-serving declaration breaks the "causal relation" to the acts of the conspiracy. *May* v. *United States,* 157 Fed. 1, 4 (9th Cir. 1907); see *Chicago M & St. P. Ry.* v. *Chamberlain,* 253 Fed. 429, 430 (9th Cir. 1918).

4. Gersh's declarations were in furtherance of the conspiracy; they accompanied acts in furtherance of the conspiracy; and they related to the object of the conspiracy. By every test they are declarations of a co-conspirator admissible, as part of the res gestae of the conspiracy, both against appellant and likewise in his favor. They would be admissible even if they had been favorable to appellant when made by Gersh provided they did not negative the common association and related to the object of that association. But in this case the statement was not exculpatory of anyone when made, nor self-serving in any way. The declaration when made fully implicated both Gersh and appellant in the black market crimes. There is no basis in reason, justice or precedent for holding them inadmissible.

II. THE DISTRICT JUDGE ERRED IN FAILING TO CALL UPON THE UNITED STATES ATTORNEY TO PRODUCE FOR EXAMINATION THE EVIDENCE IN HIS POSSESSION.

Appellant has no information and no evidence, other than Corriston's testimony, of cash payments by Gersh to obtain whiskey in the black market and certainly no evidence that Gersh's payments were passed on to persons high in the whiskey syndicate.

United States Attorney Burke admits (R. 21-22) he told Mr. Chotiner that he had evidence in his possession that the money appellant paid Gersh was passed on to people high in the whiskey syndicate.

Mr. Burke stated to Mr. Chotiner that this evidence was not conclusive of appellant's innocence because the Government was not convinced that appellant sent Gersh as much as he testified. But the evidence supplies the significant missing link that the substantial sums that appellant sent Gersh were for whiskey black market purchases. *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir. 1952). Since the evidence goes to the heart of the case it warrants a new trial as the evidence plainly raises a reasonable doubt of guilt.

The Government relies solely on the ground that appellant did not controvert Mr. Burke's statement that this "evidence" was not legally admissible evidence. That is a conclusion of law to which appellant could not respond one way or another. For appellant is, of course, unaware of the contents of the Government's files.

The narrow issue is whether the United States Attorney may make a unilateral determination conclusive upon appellant and the courts that such evidence is not legally admissible.

The broader underlying issue is one of Government absolutism. As the Supreme Court said in *Berger* v. *United States,* 294 U. S. 78 at 88 (1935):

> "The United States Attorney is representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it should win a case but that justice shall be done.''

In *Griffin* v. *United States,* 183 F. 2d 990 (Ct. App. D. C. 1950), the court held it improper for the United States Attorney to withhold significant evidence, however reasonable his views that the evidence is not legally admissible. He is a public official who has no proper interest in concealment of any part of the whole picture of the case. The evidence which he deems legally inadmissible should have been presented to the District Judge for examination. It is for the court and not the United States Attorney to determine the admissibility of the evidence.

III. THERE IS NO MERIT IN THE GOVERNMENT'S CONTENTION THAT THERE ARE GROUNDS ON WHICH THE MOTION FOR NEW TRIAL MIGHT BE DENIED EVEN IF CORRISTON'S TESTIMONY IS ADMISSIBLE. THOSE CONTENTIONS WERE NOT ACCEPTED BY THE DISTRICT JUDGE AND THEIR ACCEPTANCE WOULD CONSTITUTE AN ABUSE OF DISCRETION.

A. The Government errs in contending that the order of the District Judge was not based upon a ruling that Corriston's evidence was inadmissible

The District Judge denied a new trial on the ground that appellant's motion supported by the affidavits of Mr. Corriston and Mr. Chotiner "fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence." (R. 26)

The meaning of this ruling was plain in context. Appellant's motion prayed a new trial so that the jury could consider not merely his own unsupported testimony which alone was sufficient to result in a recommendation of leniency, but also the significant corroboration (a) in the new evidence of Mr. Corriston and (b) the new evidence available from United States Attorney Burke, according to Mr. Chotiner.

The Government contended that Mr. Corriston's evidence was not legally admissible, and that the "evidence"

in the possession of Mr. Burke was not legally admissible evidence.

Clearly the District Judge was ruling that there was no legally admissible evidence before him, and therefore there was no legal basis for granting a new trial.

In *Balestreri* v. *United States,* 224 F.2d 915, 918 (9th Cir. 1955), relied on by the Government, this Court stated that it would not reverse the denial of a motion for new trial where it was "manifest the trial court did not act arbitrarily or capriciously nor upon any erroneous concept of the law." In this case it is certainly not manifest that the "trial court did not act . . . upon any erroneous concept of the law." To the contrary it is clear that the District Judge was acting upon a view of the law of evidence, which if correct negatived any legal basis for granting a new trial, but which was erroneous.

If the District Judge had intended to exercise his discretion concerning the facts, he would have so indicated and afforded appropriate opportunity for defendant to advise him, e.g., of any error in his recollection of the facts of the case. Otherwise the denial might be based on a manifest error which the District Judge did not appreciate, and which could never be explained to him or reviewed by an appellate court—a result abhorrent to the law.

Thus, in *Balestreri* v. *United States,* supra, District Judge Goodman wrote a memorandum. He found "that no proximate relationship was shown between the occurrences [brought out by the motion concerning the prosecution's witness] . . . and his testimony later given at the appellant's trial." (p. 917), and concluded that defendant's showing did "not have the substance which would invoke the exercise of judicial discretion on a motion for new trial." (p. 918.)

In contrast, District Judge Goodman's order in this case stated that there was no "legal basis for granting the motion" and plainly was grounded upon a ruling as to

the admisibility of the evidence. His ruling is unsound in law and fully reviewable by this Court.

Furthermore, as will now be demonstrated, there is no merit whatever to the Government's contentions that there are other grounds on which the new trial might be denied. The District Judge did not accept those contentions. Indeed it would constitute an abuse of discretion to accept those contentions.

B. Denial of new trial cannot be supported on the hypothesis that even assuming the truth of defendant's testimony there was a net profit of some $17,406.71. That is flatly contrary to the records in the case and to the prior opinion of this Court.

The Government argues (Govt Br. 21) that even assuming the truth of the defense evidence [of the cash bonuses paid by appellant to obtain the case whiskey], it would appear that appellant made and failed to report a profit of some $17,406.71. This argument is wholly and palpably erroneous in fact, and indeed contrary to the prior opinion of this Court.

The Government is perfectly well aware that appellant's testimony as to the bonuses paid by appellant in the acquisition of case whiskey accounted for all his black market receipts and showed him innocent of tax evasion. That is clear from the briefs filed in this Court in the appeal from the second conviction,—not only the appellant's brief[2] but also the Government brief signed by Mr. Burke and Mr. Schnacke. That brief, filed in June 1954, stated (pp. 18-19):

> "Clearly, if the case was to be decided on the admitted facts, appellant was guilty, unless there was additional expense which resulted in no profit being realized. The only evidence of any admitted expense came from the unsupported word of the appellant himself. The only question remaining, after considering the admissions, was whether the appellant's

[2] See appellant's opening brief, No. 14109, p. 20: "There was no dispute that if Wolcher's testimony was true he made no profit on the whiskey transactions. A mathematical computation of the amounts he said he paid compared to the number of cases sold to outsiders over the ceiling prices, shows no taxable profit."

> story of his additional cost was believable, for if it was not believed by the jury, at least to the extent of raising a reasonable doubt of guilt, the admitted facts justified conviction. *If it was believed, then, of course, the jury should acquit.* The case was as simple as that, and that was what the instruction explained to the jury." (Emphasis added)

Appellant's brief on the first appeal contained the detailed mathematical computation showing that after deducting the amounts the appellant said he paid to get whiskey there was no profit in the appellant's black market receipts. The appendix to this closing brief sets forth summarizing entries copied from said brief.

That showing was a necessary part of this Court's decision in *Wolcher* v. *United States*, 200 F.2d 493 (9th Cir. 1952) rendered in No. 12992. This Court found prejudicial error in the exclusion of testimony that would have had weight in determining "whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher." But if the Government were correct that appellant's own testimony established a net profit exceeding $17,000, then this Court could not have found prejudicial error in the evidence rulings.

The Government's appendix in No. 14919 looks like a careful computation. But it rests on a glaring omission: *It ignores the bonuses which defendant had to pay in order to obtain the whiskey which was resold at the ceiling price.*

It is hard for appellant to understand how the Government,—"whose interest in a criminal prosecution is not that it should win a case but that justice shall be done" (*Berger* v. *United States, supra*, p. 11)—could have omitted these payments by appellant in the computations it prepared for this Court.

The distortion from this omission is clear. Take, for example, the third Eastern shipment, of 500 cases of Golden Wedding whiskey. The Government's computation shows, correctly, that 50 cases were resold at ceiling,[3]

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[3] They were resold to the "Showboat", (R.14109, p. 131), a bar in which appellant was interested (R. 14109, p. 346).

and that the balance of 450 cases were resold over ceiling. The Government's appendix states that to get the whiskey, appellant paid a cash bonus of $9,000 (450 cases at $20 a case). But appellant testified he paid a bonus of $20 a case on all the whiskey received in this shipment (R.14109, p. 361-2). Since 500 cases were received that means a payment of $10,000 instead of $9,000.

It is undeniable that appellant's testimony shows that he paid more than $17,500 as bonuses merely to get the Eastern whiskey he resold at ceiling to taverns in which he or members of his family were interested. The Government's computation shows a profit only because its reflects only the bonuses paid to obtain 3,764 cases of whiskey, as if 3,764 cases were all that was involved. But appellant, as the Government brief points out (p. 19), handled 5,138 cases of whiskey.

It is appropriate to note that the Government's statement Govt. Br., p. 3) that appellant "did not appear" in the transactions involving sales to taverns at ceiling prices is wholly misleading. The *form* of the transactions, both to the taverns of outsiders and to the taverns of appellant and his family, was that of sales at ceiling by the distributors. The *substance* is that the distributor in all cases acted as appellant's agent. The Government's own witnesses unequivocally testified that it was appellant and only appellant who arranged for shipment of this case whiskey from the East, that only appellant had an interest therein, and that only appellant gave directions as to its distribution.[4] In short, it is appellant's contention—and this contention is supported by his testimony—that he paid a substantial black market bonus to obtain 5,138 cases of the whiskey, and that he recouped this outlay, and no more, on the sales to outsiders.

The computations in appellant's opening brief in No. 12992, summarized in the appendix, *infra,* p. 25 make no inference favorable to appellant other than accepting his

[4] As to Franciscan Co., see testimony of Government witness Samuel Weiss (R.14109, pp. 123-125, 142-143.) As to George Barton Co., see testimony of Government witness Cy Owens (R.14109, pp. 75-7, 84, 89-90) and James Oligny (R.14109, pp. 103-4, 109).

testimony of the cash bonuses paid by him to obtain the whiskey. Indeed, as appears from the Note to the appendix, *infra,* appellant's computation assumes even greater cash receipts by appellant than the Government's computation. It does not assume that any of the appellant's sales were at ceiling except for the whiskey kept for and sold to the taverns in which appellant and his family were interested, taverns which undeniably purchased at ceiling. The Government, concededly, has not proved any greater receipts for appellant on the second trial than at the first trial.

In an effort to sustain the ruling below as an exercise of discretion, the Government has baldly ignored a substantial part of the bonus payments testified to by appellant—not only disregarding the clear record and the opinion on the first appeal, but also apparently forgetting its own brief in No. 14109.

C. Denial of new trial cannot be supported on the hypothesis that the volume of whiskey admittedly involved shows appellant is guilty of income tax evasion.

The Government argues that since admittedly appellant was engaged in handling 5,138 cases of whiskey it is "simply unbelievable" that he made no profit and therefore "it is extremely unlikely" that any jury could acquit (Govt. Br., 19-22).

The Government's contention was properly ignored by the District Judge since (1) it misrepresents the basis of the defense and (2) it wholly ignores this Court's first opinion and the substantial corroboration of appellant.

1. The Government's argument misrepresents the basis of the defense by making it seem as though appellant is claiming that no advantage inured to him from the handling of this whiskey.

On the contrary, appellant expressly testified that "there was a profit made, but not from the sale of the liquor by the case as such." (R.14109, p. 410.) Appellant's sales over ceiling did yield a profit but in this sense,—that liquor, which was practically speaking unavailable in ordinary commercial channels, was purchased by the case and sold by the glass in the taverns owned by ap-

pellant and members of his family. Instead of having to pay black market prices these taverns were able to purchase from appellant full supplies of case whiskey at ceiling prices. This difference alone exceeds $17,500 apart from the profit due to the fact that larger volumes of whiskey were handled than could otherwise be acquired at ceiling.

The taverns concededly made profits but there is no contention, and there could be none, of understatement of income in the returns filed for these taverns. In short, the "retail" profits were not understated; the critical question is whether appellant also made a profit on the "wholesale" sales of case whiskey. Appellant's claim is that he made no profit on the purchase and sale of case whiskey.

2. The Government's contention wholly ignores both this Court's first opinion and the significant corroboration of the Corriston evidence.

In *Wolcher* v. *United States,* 200 F.2d 493 (9th Cir. 1952), this Court found prejudicial error in the exclusion of evidence tending to impeach Gersh's explanation that the money he received from appellant was to buy coin machines. The Government then argued that any error of the trial court was not prejudicial in view of the uncontradicted evidence of appellant's large cash overceiling receipts which he withheld from his ordinary banking and business records. (Govt. Br., No.12992, p. 42.)

This Court rejected the view that this error in excluding pertinent evidence did not "affect substantial rights" of the appellant, and said:

> "We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher." (200 F. 2d at p. 499.)

The Government's argument now is in essence the same as its argument in No. 12992, that the mere admitted facts are virtually incontrovertible evidence of guilt.

The argument must fall now as it fell then. This Court is aware now as it was aware then that appellant's defense is a substantial one. This Court was fully aware at the time the case was remanded for new trial that Gersh admitted the handling of only 60% of the amounts which the appellant testified he sent to Gersh. But the amounts admittedly handled by Gersh were very substantial.

The missing link, the substantial gap in the case, was the need for evidence to support appellant's testimony that the moneys he sent to Gersh were for the purchase of black market whiskey. While Gersh "stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher." (200 F. 2d at p. 495.)

So far as amounts are concerned, Corriston's testimony would corroborate appellant's testimony, contradicted by Gersh, that in November 1943 appellant gave Gersh $30,000 in cash. This is, of course, in addition to Gersh's net receipts of the $50,800 corroborated by bank records at the first trial.[5] This corroborates payments to Gersh of over 90% of the amount that Mr. Schnacke established as appellant's overceiling receipts on the resale of the Eastern whiskey.[6] The balance is accounted for by appel-

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[5] Part of the $85,800 admittedly handled by Gersh consisted of two bank drafts totaling $35,000 which appeared on appellant's books, and which was eventually cleared off by Gersh's checks or merchandise.

At the first trial it was also established that appellant sent Gersh a $12,500 cashier's check on September 29, 1943, and $38,300 in cash. These cash shipments were shown by Gersh's own bank account records of deposits, records that Gersh could not gainsay (See Appellant's Opening Brief, pp. 7-9).

The $30,000 which appellant testified he gave Gersh in cash in November 1943 is in addition to the moneys which Gersh admittedly handled.

[6] Mr. Schnacke established appellant's overceiling receipts on the Eastern whiskey at $88,853.71. The details are contained in typewritten transcript of Mr. Schnacke's summation, August 31, 1953, pp. 3-9. They are summarized in the table at page 5 of appellant's opening brief.

Appellant's own testimony supplied the bulk of the evidence of appellant's overceiling facts to which Mr. Schnacke referred. See Note to Appendix, *infra*, p. 27. Mr. Schnacke quite properly excluded any reference to the few bars where appellant did not have a recollection as to the basis of his sales.

lant's testimony of occasional shipments to Gersh of lesser cash sums (R. 14109, p. 404).

But the prime importance of Corriston's evidence is that it supplies the critical missing link: it furnishes corroboration for appellant's otherwise unsupported evidence that the money he sent Gersh was for cash overages in buying whiskey in the black market.

As Justice Douglas states in his opinion of December 31, 1955 (appendix to appellant's opening brief):

> "He [Corriston] offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey * * * If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Mr. Schnacke put it to the jury, and most persuasively, that there was nothing to support appellant's testimony that he sent large sums to Gersh to pay as cash bonuses for black market whiskey, nothing to show that Gersh was a "significant factor." (R. 7-8.)

Corriston's evidence will not be merely cumulative of other testimony of the same kind but will be corroboration in a record devoid of any evidence other than appellant's unsupported testimony that he made payments to Gersh to obtain whiskey in the black market, or indeed that Gersh made any purchases in the whiskey black market. There is a fundamental distinction between such corroborative evidence and merely cumulative evidence. 32 C.J.S., Evidence, p. 1039. Corriston's evidence "goes to the heart of the case." It is, in Judge Chesnut's phrase, "substantial in the perspective of the case as a whole." *United States* v. *Frankfeld,* 111 F. Supp. 919, 923 (D.Md. 1953). It will obviously carry weight with the jury, and there is every reason to expect that the jury will find the appellant not guilty.

D. Denial of new trial cannot be supported on the ground that there is no new evidence.

The Government argues (Govt. Br., 17-19) that "there is no new evidence," and that Corriston's testimony is "to the same effect as direct, competent testimony which was available to appellant at the time of trial." There is no substance to this Government contention.

Appellant's motion for new trial and supporting affidavits, construed fairly and liberally to the accused (see *Hamilton* v. *United States,* 140 F. 2d 679, Ct. App. D. C. 1944), clearly submits that Corriston's evidence is the first evidence available to appellant of Gersh's black market whiskey purchases (other, of course, than appellant's own testimony), and explains why such evidence was not previously known to appellant.

The Government notes that Gersh was a witness at the first trial but was not called as a witness at the second trial.[7] But all defense would have obtained from Gersh was corroboration of appellant's testimony that he sent substantial sums of cash to Gersh. Gersh would not have testified to the crucial corroboration now supplied by Corriston, as to Gersh's cash purchases of whiskey in the black market. Indeed when Gersh was called by the Government at the first trial he testified exactly to the contrary, that he at no time made large purchases of whiskey, either in his own behalf or for anyone else. (R.12992, p.558). But of course by trial time Gersh's interest had become adverse and hostile to appellant's.

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[7] It will be recalled that Gersh was subpoenaed by Government and released by Mr. Schnacke without notice to the defense; that Mr. Schnacke challenged as immaterial the examination of Appling (revenue agent in charge), to identify the Gersh bank records authenticated by Gersh as a Government witness at the first trial; that Mr. Schnacke refused to stipulate those records on the ground that he was not present at the first trial and knew nothing of those records; and that Mr. Schnacke objected to the application of defense counsel, made immediately after the recess and promptly upon learning that Gersh was in fact in town to call Gersh to identify the bank records. See R. 14109, pp. 464-473.

Mr. Schnacke seeks credit from the fact that at the second trial he offered to stipulate the reading of Mayer's testimony at the first trial. This was hardly a magnanimous proposal—Mr. Schnacke was merely offering to stipulate testimony that he knew fell short of proof that Gersh had engaged in whiskey black market transactions. For although Mayer testified at the first trial that Gersh arranged for a whiskey shipment from Mayer to Franciscan (R. 12992, pp. 402-7), Mayer did not testify that Gersh had made any cash payment to get the whiskey. Moreover, the Government is fully aware that Mayer, who had been subpoenaed by the Government from the East Coast (R.12992, p.404), advised both the Government and defense counsel that he would decline to answer whether he had charged Gersh a bonus on the whiskey.

The Government's contention as to Taylor, made now for the first time, is likewise without substance. Prior to Corriston's disclosure, appellant, of course, was unaware of Gersh's black market activities with Taylor for the very obvious reason that Gersh, the only other party involved, instead of revealing the facts deliberately concealed and misrepresented them.

Direct, competent testimony of Gersh's black market activities was not previously available to appellant. It is of course no easy task to secure evidence of black market activities from those reluctant to disclose any knowledge of or contact with such activities. It was not until recently, when Corriston overcame that reluctance and came forward with his testimony, that appellant had available any testimony to corroborate his own evidence of his black market payments.

CONCLUSION

The District Judge erred in his conclusion that the Corriston evidence was legally inadmissible, and in giving conclusive effect to the affidavit of the United States

Attorney that the evidence in his possession was not legally admissible.

To obtain an affirmance, the Government hypothesizes that the District Judge might have exercised a discretion as to the facts, and offers a number of possible grounds. The District Judge did not deny the motion on the basis of these Government contentions. And indeed he could not properly have done so, for the Government's contentions, considered one at a time, prove to be contrary to the record and to this Court's prior opinion. That opinion rejected the contentions now being urged by the Government that appellant's defense is insubstantial.

Appellant has been convicted for his black market violations. He admits that the black market operations resulted in substantial benefit to the taverns in which he and his relatives were interested, but the Government does not contend there was an understatement of income for these taverns. Appellant denies the charge that he realized taxable income on the wholesale sales of whiskey by the case.

The issue is not what the prosecuting attorney contends, but what the jury may be reasonably expected to believe. Although appellant has been convicted twice, each time the conviction was on a record truncated due to the objections of the prosecuting attorney. Now due to the newly-discovered evidence the record will contain for the first time clear evidence corroborating appellant's critical testimony as to his payments for black market whiskey. No such corroborative evidence was available or known to the appellant prior to the recent discovery of the facts disclosed in Corriston's affidavit.

The jury recommended leniency on a record which was, as the prosecutor tellingly pointed out, devoid of such corroboration. The newly-discovered evidence corroborating appellant "goes to the heart of the case," and requires a new trial.

The order of the District Judge should be reversed and remanded with instructions to grant a new trial pursuant to Rule 33.

Respectfully submitted,

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Harold Leventhal
Attorneys for Appellant

Dated: San Francisco, California
March 19, 1956

APPENDIX

The following entries of appellant's net profit and loss on the sale of case whiskey, shipment by shipment, are taken from the computation in appellant's opening brief (appendix, pp. xix-xxi) on the first appeal (*Wolcher* v. *United States,* No. 12992, U. S. Court of Appeals for the Ninth Circuit)

WOLCHER'S PROFIT AND LOSS
IN THE SALE OF CASE WHISKEY

Shipment	Net Profit (Or Loss)
100 cases Supreme Bourbon	$ 13.45
500 cases Schenley Royal Reserve	(1,618.55)
500 cases Golden Wedding Rye	1,475.00
500 cases Gallagher & Burton	(1,188.00)
1000 cases Gallagher & Burton	850.00
2038 cases Old Boston Rocking Chair (including $3,000 commission from George Barton Co.)	1,835.00
500 cases Old Brook	(2,012.50)*
Net Profit	$1,730.80

But tax was paid on $3,000, the commission paid to Wolcher by George Barton Co. on the Old Boston Rocking Chair whiskey transaction.

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* There is a minor arithmetical error. The Old Brook loss should be $2,912.50, and the net profit should be reduced by $900.00.

The detailed computations are set forth in appellant's opening brief in No. 12992. The profit and loss figures, shipment by shipment, can also be determined by comparing appellant's cash payments, (bonuses paid over and above the OPA price shown as invoice cost), with appellant's cash receipts (sales price to outsiders less invoice cost), as follows:

SUPREME BOURBON

Cash Payments Above Ceiling:	100 cases at $20.00	$ 2,000.00
Cash Receipts Above Ceiling: ($55 less $33.35 invoice)	93 cases at 21.65	2,013.45
Sold at Ceiling:	7 cases	—
Net Profit		$ 13.45

SCHENLEY ROYAL RESERVE

Cash Payments Above Ceiling:	500 cases at $20.00	10,000.00
Cash Receipts Above Ceiling: ($60.00 less $38.23 invoice)	385 cases at 21.77	8,381.45
Sold at Ceiling:	115 cases	—
Loss		($ 1,618.55)

GOLDEN WEDDING RYE

Cash Payments Above Ceiling:	500 cases at $20.00	10,000.00
Cash Receipts Above Ceiling: ($60.00 less $34.50 invoice)	450 cases at $25.50	11,475.00
Sold at Ceiling:	50 cases	—
Net Profit		$ 1,475.00

GALLAGHER & BURTON

Cash Payments Above Ceiling:	500 cases at $25.00	12,500.00
Cash Receipts Above Ceiling: ($60.00 less $30.50 invoice)	464 cases at $29.50	13,688.00
Sold at Ceiling:	36 cases	—
Loss		($ 1,188.00)

GALLAGHER & BURTON

Cash Payments Above Ceiling:	1000 cases at $25.00	$25,000.00
Cash Receipts Above Ceiling:		
Fifths: ($60.00 less $30.50 invoice)	500 cases at $29.50	14,750.00
Pints: ($60.00 less $37.80 invoice)	500 cases at $22.20	11,100.00
Net Profit		$ 850.00

OLD BOSTON ROCKING CHAIR

Cash Payments Above Ceiling:	2038 cases at $25.00	50,950.00
Cash Receipts Above Ceiling: ($60.00 less $26.92 invoice)	1505 cases at $33.08	49,785.40
Sold at Ceiling:	533 cases	—
Commission from George Barton Co.		3,000.00
Net Profit		$ 1,835.40

OLD BROOK

Cash Payments Above Ceiling:	500 cases at $20.00	$10,000.00
Cash Receipts Above Ceiling: ($72.15 less $51.90 invoice)	350 cases at $20.25	7,087.50
Sold at Ceiling:	150 cases	—
Loss		($ 2,912.50)

As appellant's brief in No. 12992 sets forth, these calculations of profit and loss are based on the following:

(1) OPA price equals "invoice cost." This does not include bonuses paid by appellant.

(2) Bonuses paid by appellant as stated in his testimony.

(3) It is assumed that the only sales at ceiling prices are to taverns in which appellant or his family were interested; and that the selling price is the same on all sales to outsiders: $60 per case, except for Supreme Bourbon ($55) and Old Brook ($72.15).

NOTE

The computation in appellant's appendix assumes even greater cash receipts by appellant than the Government's computation in its appendix in No. 14919.

In the first place, the great bulk of the Government's evidence of black market receipts came from appellant himself. The Government's witnesses, thirteen tavern owners and Roy Clemens, accounted for approximately $30,000 in appellant's black market cash receipts.

It is on the basis of this testimony by appellant that Mr. Schnacke pointed out in his summation to the jury that the amount of appellant's over-ceiling receipts shown in the proof was more than twice as great as the amount in the indictment or the amount stated in the prosecution's opening statement. (See Transcript, Summation August 31, 1953, p. 9.)

Appellant candidly testified on cross-examination that he sold whiskey in the black market, at $55 a case on the first Eastern shipment, and at $60 a case thereafter, not only to the taverns covered by the Government's witnesses, but also to other taverns, one by one.

Appellant testified that only ceiling prices were obtained from taverns in which he or his relatives had an interest. In the case of three other taverns he did not recall the

price.* The Government quite properly admits in its computation, as Mr. Schnacke admitted at argument, that it had not proved overceiling receipts on these three taverns. But the foregoing computation set forth by appellant in this Appendix treats all sales to outsiders alike. Only sales to taverns in which appellant or members of his family had an interest are computed as sales at ceiling.

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* See R. 14109, pp. 428-434. Appellant testified that he thought the 2089 Club paid $55, but he didn't remember, and the shipment there might have been at ceiling. There was a chance that they bought at ceiling. As to House of Pisco, which took two shipments, there may have been a shipment at ceiling. As to International House, he did not remember but he might have let them have it at his cost, and might have let them buy at ceiling.